

Issue: Group III Written Notice with termination (client neglect); Hearing Date: 01/25/05; Decision Issued: 02/28/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7954; **Administrative Review: EDR Ruling Request received 03/15/05; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7954

Hearing Date: January 25, 2005
Decision Issued: February 28, 2005

PROCEDURAL HISTORY

On November 5, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Neglect of a Client (failure to timely discover a client's injury). Based on findings of [Investigation] as confirmed by the Department of Mental Health, Mental Retardation, and Substance Abuse Services Central Office

On November 5, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 31, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 25, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for client neglect.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Direct Service Aide II at one of its Facilities. One of her responsibilities was to make a head to toe assessment of her clients when she awoke them. She began working for the Agency on June 10, 2003. No evidence of prior disciplinary action against Grievant was introduced during the hearing.¹

On October 3, 1954, the Client was admitted to the Facility at the age of two years and five months. His admission diagnosis was Mental Retardation with congenital cerebral mal-development, nonspecific. Due to a peripheral vascular disturbance of the feet, much of his time is spent with his feet elevated in a chair on a mat table. He is able to move his wheelchair about with the hands. He is nonverbal and communicates through vocalization, facial expressions, and behavior. The Client sleeps in a bedroom located approximately 100 feet from the dayhall. He must be placed in a wheelchair to move from his bedroom to the dayhall. He is not able to dress himself.

The Client was hit in the right eye. It is not likely that the Client's injury was self-inflicted since he had no history of hitting himself in the eye and he sleeps in a padded bed. The skin directly below his eye was bruised and darkened.

Grievant's works on the third shift which begins at 11:15 p.m. and ends at 7:15 a.m. the following morning. First shift workers begin at 7:00 a.m. This means there is a 15 minute period when employees from both shifts are working.

¹ The Written Notice, however, indicates that Grievant had received two prior active Group I Written Notices.

Grievant was responsible for assisting the Client and seven other clients at the living unit. On April 4, 2004, between 5:45 a.m. and 6 a.m., Grievant awoke the Client. Lights in the bedroom were turned on. The Client was sleeping on his right side. Grievant dressed the Client from behind.² Grievant asked another employee, Ms. N, to help place the Client in his wheelchair. The Client is too heavy for Grievant to lift by herself. Ms. N did not notice any injury to the Client's right eye because she was positioned to his left side. Either Ms. N or Grievant rolled the Client into the dayhall. The Client was placed on a daybed in the dayhall. Lights in the dayhall were turned on. The Client went back to sleep and slept on his right side with the sheets pulled to cover his head.

At 6:12 a.m., the third shift Medication Aide went to the dayhall and observed the Client sleeping on his right side. She had crushed his medication and mixed it with applesauce. The third shift Medication Aide had the Client raise his head and turn it just enough for her to give him his medication.³ He then put his head back down. The third shift Medication Aide did not observe completely the right side of the Client's face.

At approximately 7:30 a.m., the first shift Medication Aide pulled the sheet down from the Client's head and turned him face up in order to give him his medication. She noticed the bruise under Grievant's right eye and asked another employee about the bruise.

When clients are awoken in the morning, direct care staff are supposed to make a full assessment of each client's condition. On April 4, 2004, Grievant did not make a full assessment of the Client.

CONCLUSIONS OF POLICY

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are punished severely. Departmental Instruction ("DI") 201-3 defines client neglect as:

Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.

² Grievant stated that "it's easier to go behind him and put his shirt on that way."

³ See Agency Exhibit 15 where the third shift Medication Aide states, "[The Client] raises his head and turns just enough for me to give his meds and turns back to the side. I did not observe completely the right side of his face."

The Client's bruise was visible when Grievant awoke him. The lights were on in the bedroom such that Grievant should have been able to see the bruise to the Client's eye had she looked at his eyes. Grievant was responsible for making a head to toe assessment of the Client, but was too rushed to do so. Because Grievant did not make a head to toe assessment of the Client, the Client's bruise went unnoticed. Approximately one and a half hours later, another employee noticed the bruise and reported the Client's status. By failing to perform a full assessment of the Client, Grievant failed to provide care necessary to the welfare of a person receiving care and treatment for mental retardation. Grievant's behavior amounts to neglect as defined by DI201. Removal from employment is expected under DI201. Accordingly, the Agency's issuance of a Group III Written Notice with removal must be upheld.

Grievant contends that the third shift Medication Aide should have noticed the bruise when she gave the Client his medication. This argument fails because the Client was sleeping on his right side when the third Medication Aide briefly awoke him and gave him his medication from his left side. The Client was laying down on his right side when he received his medication. He turned his head just far enough to enable the Medication Aide to give him his medication. The Medication Aide was not in a position to see the Client's right side and right eye.

Grievant contends dim lighting prevented her from seeing the bruise. This argument fails because testimony showed that lights in the bedroom and dayhall were turned on. If Grievant had looked at the Client's right eye, she would have seen the bruise.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.